COURT OF APPEALS
DECISION
DATED AND RELEASED

June 18, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-1586-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. John Williams appeals from a judgment convicting him of one count of armed robbery in violation of § 943.32(1)(b) and (2), STATS., and one count of armed burglary in violation of § 943.10(1)(a) and

(2)(a), STATS.[1] Both convictions were as a repeater pursuant to § 939.62(1)(c), STATS. Williams has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and the order.

Williams raises numerous arguments which we will address seriatim. His first argument challenges the admission of evidence that he was on probation at the time of the current offenses. He contends that the prejudicial nature of the evidence outweighed any probative value it had.

A trial court has broad discretion in determining the relevance and admissibility of proffered evidence. *See* ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988). Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* § 904.01, STATS. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* § 904.03, STATS. Evidence is unfairly prejudicial if it has a tendency to influence the outcome of the proceeding by improper means. *See* ***State v. Bedker***, 149 Wis.2d 257, 266-67, 440 N.W.2d 802, 805 (Ct. App. 1989). We will not find an erroneous exercise of discretion in the admission of evidence if any reasonable basis exists for the trial court's decision. *See* ***State v. Lindh***, 161 Wis.2d 324, 361 n.14, 468 N.W.2d 168, 181 (1991).[2]

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[1] Sections 943.10(2)(b) and 943.32(2), STATS., were amended. *See* 1995 Wis. Act 288, §§ 1 and 3, respectively. The amendments do not affect our analysis.

[2] We now use the phrase "erroneous exercise of discretion" rather than "abuse of discretion" when reviewing a trial court's discretionary act. However, the meaning remains the same. S*ee* ***State v. Plymesser***, 172 Wis.2d 583, 585 n.1, 493 N.W.2d 367, 369 (1992).

The complaint against Williams alleged that on July 2, 1994, he placed a knife to the back of Olga Raglin, forced his way into her apartment and took money from her purse. At trial, Raglin testified that she had almost $10,000 in her purse, which she was saving for her daughter Evelyn. Wilson admitted to the police and in his testimony at trial that he obtained money from Raglin, but claimed that it was $700 and that it was given to him by Raglin as a loan.

At trial, the State presented evidence from a probation agent who testified that Williams was under her supervision in July 1994. She further testified that she attempted to contact Williams after being alerted by the police that he was a suspect in a robbery, but found that he was no longer living at his last known address. The agent testified that because leaving without notifying his agent was a violation of Williams' probation, she issued the equivalent of a warrant for his arrest. Other evidence indicated that Williams left Kenosha the day after the reported robbery of Raglin, going to a hotel in Milwaukee where he was subsequently arrested.

The trial court properly determined that evidence concerning Williams' probation status was relevant. Evidence of a defendant's flight is admissible as an indicia of consciousness of guilt, and therefore of guilt itself. *See* ***State v. Winston,*** 120 Wis.2d 500, 505, 355 N.W.2d 553, 556 (Ct. App. 1984). In this case, evidence that Williams fled Kenosha the day after the robbery supported an inference that he stole Raglin's money, rather than receiving it as a loan. *See* ***State v. Selders***, 163 Wis.2d 607, 621, 472 N.W.2d 526, 531 (Ct. App. 1991). This inference was strengthened by the evidence that he was on probation, indicating that he feared the consequences of remaining in Kenosha more than he feared the consequences of violating his probation by leaving without notifying his agent. In addition, it supported an inference that he did not want his probation

agent to know where he was because if she knew then the police would also be able to find him.

Because the evidence regarding Williams' probationary status was material to determining whether he took money from Raglin with the motive and intent to steal it, or whether it was given freely to him as he contended, the trial court properly found it to be relevant. *See* ***State v. Ingram***, 204 Wis.2d 177, 183, 554 N.W.2d 833, 835-36 (Ct. App. 1996). This is true regardless of whether the evidence is reviewed under general relevancy standards or whether it is viewed as other acts evidence subject to § 904.04(2), STATS. *See* ***Ingram***, 204 Wis.2d at 189, 554 N.W.2d at 838. In addition, the trial court properly determined that the relevancy of the evidence outweighed any prejudice arising from it, particularly since other properly admitted evidence indicated that Williams had five prior convictions. In light of that evidence, any prejudice arising from evidence that Williams was on probation at the time of these crimes must be deemed negligible.[3] Moreover, any prejudice was further reduced or eliminated by the cautionary instruction given by the trial court indicating that the jury could consider evidence that Williams had committed previous crimes only to assess his credibility and could not use his prior convictions as proof that he was guilty of the charged offenses. *See* ***State v. Parr***, 182 Wis.2d 349, 361, 513 N.W.2d 647, 650 (Ct. App. 1994).

Williams also objects to the admission of evidence that he had a drug habit and debts related to it, and that he was in jail when he made

[3] We recognize that the trial court did not expressly set forth all of this reasoning in admitting the evidence. However, when a trial court does not set forth its reasons for admitting evidence, we are required to search the record and uphold the decision if the record provides a reasonable basis for it. *See* ***State v. Lindh***, 161 Wis.2d 324, 361 n.14, 468 N.W.2d 168, 181 (1991).

incriminating statements to another inmate concerning the robbery of Raglin. However, evidence that he told both another inmate and the police that he had a $300-per-day drug habit which he partially financed on credit was relevant to establish his motive to rob Raglin. *See* ***State v. Johnson***, 184 Wis.2d 324, 338, 516 N.W.2d 463, 467 (Ct. App. 1994); *see also* ***Brecht***, 143 Wis.2d at 320, 421 N.W.2d at 105. In this case, evidence that Williams had an expensive drug habit and debts arising from it was relevant not only to prove that he had a motive to rob Raglin, but also to disprove his contention that he only borrowed money from her. A jury could reasonably infer that a person who consumed $300 per day in drugs would want more than $700 to supply his habit and repay past debts. The trial court therefore reasonably determined that the evidence was relevant and that its relevance outweighed any prejudice arising from it. Moreover, the trial court expressly instructed the jury that it could consider the evidence of Williams' need for drug money only on the issue of motive and could not use it to conclude that he had a bad character and was acting in conformity with that character by committing the charged crimes. This instruction presumptively removed any prejudice arising from admission of the evidence. *See* ***State v. Shillcutt***, 116 Wis.2d 227, 238, 341 N.W.2d 716, 721 (Ct. App. 1983), *aff'd,* 119 Wis.2d 788, 350 N.W.2d 686 (1984).

We also find no error in the admission of James Lowery's testimony that he and Williams were in the county jail when Williams told him about his drug habit and debts and admitted robbing Raglin. Lowery testified that he was a jailhouse lawyer and that Williams sought to talk to him about his case. The information concerning Williams' inmate status thus was relevant to establish the context in which his admissions were made, providing an explanation for why Williams would make damaging admissions to someone he barely knew. *See* ***id.*** at

236, 341 N.W.2d at 720. Moreover, as with the information regarding Williams' probationary status, the information that he spoke to Lowery in jail was of little prejudice in light of the properly admitted evidence that he had five prior convictions. Similarly, any prejudice was presumptively eliminated by the trial court's instruction that Williams' prior convictions could be considered only in assessing his credibility and not as a basis for inferring that he had a bad character and was acting in conformity therewith.

Williams next contends that his trial counsel rendered ineffective assistance to him and that the trial court improperly refused to grant him an evidentiary hearing on this issue. We disagree.

To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *See* ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990).

Even if deficient performance is found, a judgment will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *See* ***id.*** at 127, 449 N.W.2d at 848. We need not address the deficiency prong of the test if prejudice is not shown. *See* ***id.*** at 128, 449 N.W.2d at 848. Moreover, a trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact or presents only

conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996); ***State v. Washington***, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993).

Applying these standards, we conclude that the trial court properly denied Williams' motion without holding an evidentiary hearing. Contrary to Williams' claim that trial counsel did not object to the admission of testimony regarding his probationary and inmate status or his drug use, the record establishes that counsel objected when the prosecutor first indicated that she intended to use such evidence. Most importantly, the evidence was properly admitted for the reasons already discussed. Trial counsel's failure to raise all of the specific objections raised by Williams in his brief on appeal therefore provides no basis for concluding that her representation constituted ineffective assistance.

Williams also objects to his trial counsel's failure to question Raglin's daughter, Evelyn, or to call her as a witness to testify as to the amount of money her mother was safeguarding for her. Trial counsel has a duty to make either a reasonable investigation or a reasonable decision that an investigation is unnecessary. *See* ***Strickland***, 466 U.S. at 691. A particular decision not to investigate must be directly assessed for reasonableness in light of all of the circumstances, applying a heavy measure of deference to counsel's judgment. *See* ***id.***

In this case, trial counsel had no reasonable basis to believe Evelyn's testimony would assist the defense. While Williams indicates that she might have testified that her mother was saving less than $10,000 for her, the amount of money involved was not an element of either of the crimes with which Williams was

charged. Moreover, a police detective testified that the figure of $10,000 was obtained from Evelyn herself, adding up the amounts she had given her mother weekly plus her tax refunds over the last two and a half years. Consequently, there was no reason for counsel to believe that Evelyn would indicate that a smaller amount was taken or that Williams would be able to use her testimony as a basis to challenge the credibility of Raglin. Counsel could reasonably conclude that any impeachment of Raglin's credibility based on the amount of money allegedly taken could only come from inconsistencies in Raglin's own testimony, including her acknowledgment that she initially told police that about $5000 was taken.

In his brief on appeal, Williams also complains that his attorney should have objected to what he terms Lowery's "rambling, nonresponsive testimony." However, he fails to specify what particular portion of Lowery's testimony he is referring to, nor does he indicate what objection should have been made or how it would have resulted in the exclusion of any evidence. Moreover, trial counsel's questioning of Lowery was helpful to Williams' defense, leading Lowery to admit that he had been diagnosed with a multiple personality disorder and raising questions of whether he was alleging that Williams made incriminating admissions for the purpose of currying favor with law enforcement authorities and enhancing his own efforts to obtain postconviction relief.

While Williams contends that his trial counsel should have requested or obtained some kind of evaluation of Lowery's ability to decipher and recall the truth, he provides no reason to believe that even if a psychological evaluation had been conducted it would have yielded an expert opinion that Lowery was incapable of perceiving or recalling what he had seen and heard. Since a defendant must base a challenge to his or her representation on more than speculation, this argument

provides no basis for determining that trial counsel was ineffective. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 350 (Ct. App. 1994).

Williams also contends that the objection made by trial counsel to the testimony of Bruce Muraski, a prison officer, was too vague. However, regardless of the adequacy of the objection, this argument provides no basis for relief because Muraski's testimony was clearly admissible. Lowery's credibility and character for truthfulness were challenged through trial counsel's questioning, which raised an issue of whether Lowery was falsely alleging that admissions were made by Williams to curry favor with law enforcement authorities. When asked if he had an opinion as to Lowery's character for truthfulness, Muraski simply testified that he had known Lowery for eight years in his capacity as a prison guard and Lowery had always been truthful with him. Because Lowery's character for truthfulness had been attacked on cross-examination, opinion testimony as to his general character for truthfulness was permissible. *See* ***State v. Anderson***, 163 Wis.2d 342, 349, 471 N.W.2d 279, 281 (Ct. App. 1991); *see also* § 906.08(1), STATS.

Contrary to Williams' contention, Muraski's testimony did not violate ***State v. Romero***, 147 Wis.2d 264, 277, 432 N.W.2d 899, 904 (1988), or ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984), because Muraski did not testify that Lowery was telling the truth in this particular case. Similarly, Williams is wrong when he complains that Muraski's testimony was objectionable because it constituted an expert medical opinion on the capacity of a person with multiple personalities to tell the truth. Muraski did no more than express an opinion that Lowery was a credible person because he had been truthful with him in the past.

Williams also contends that his trial counsel was ineffective for failing to object to statements made by the prosecutor in her closing argument. Again, these contentions provide no basis for relief because the prosecutor's comments were permissible. Contrary to Williams' contention, the prosecutor did not argue that Lowery should be deemed more credible *because* he had a multiple personality disorder. Rather, she argued that he was credible despite this disorder. This argument was properly based on Lowery's testimony that his disorder did not interfere with his ability to perceive and tell the truth and the lack of any evidence to the contrary. *See* ***Johnson***, 153 Wis.2d at 132 n.10, 449 N.W.2d at 850.

Similarly, the prosecutor's comments about Williams' exercise of his constitutional rights were permissible. This was not a situation where a prosecutor made an impermissible comment on the defendant's invocation of his or her right to remain silent, since Williams gave a statement to the police after waiving his ***Miranda*** rights and testified at trial. Rather, the prosecutor argued that Williams perverted his rights by making statements before and at trial which were false. A prosecutor may voice doubts about the truthfulness of a defendant who has taken the witness stand when, as here, the prosecutor's comments are supported by the record. *See* ***Johnson***, 153 Wis.2d at 132-33, 449 N.W.2d at 850. Moreover, the prosecutor's description of trial rights as "expensive, important, big" was made in the context of arguing that Williams had been given a fair trial and that the evidence indicated that he had lied on the witness stand and was guilty. The argument was permissible, and even if it contained an inappropriate reference to cost, it was not prejudicial since the cost of prosecution was an obvious fact of which any reasonable jury was already aware. *See* ***Ziegler v. State***, 65 Wis.2d 703, 709-10, 223 N.W.2d 442, 444-45 (1974), *overruled in unrelated part on other grounds by* ***State v. Williquette***, 190 Wis.2d 677, 694 n.11, 526 N.W.2d 144, 151 (1995).

We also reject Williams' argument that the trial court erroneously exercised its discretion by denying his postconviction motion without a hearing. As the previous discussion indicates, most of Williams' arguments could properly be rejected without a hearing on the ground that the record conclusively showed that they provided no basis for relief. This is true for Williams' evidentiary arguments and his arguments concerning the prosecutor's closing arguments. In addition, Williams' postconviction motion failed to set forth sufficient facts to raise an issue of fact as to whether his trial counsel should have investigated the testimony of Raglin's daughter and called her as a witness. The motion did not even identify the daughter by name, alleging only that counsel was ineffective for failing "to investigate and call a witness on [Williams'] behalf whose testimony would have challenged the possession and amount of money deemed to be stolen." By failing to specify who the proposed witness was, what information she could have provided, and how it would have been helpful to Williams' case, Williams' allegations were properly found by the trial court to be completely conclusory on this issue and insufficient to warrant an evidentiary hearing. Furthermore, Williams' appellate argument that his trial counsel should have obtained some kind of evaluation of Lowery's ability to decipher and recall the truth was not even mentioned in his postconviction motion, and thus clearly provided no basis for holding an evidentiary hearing.

Williams' final argument is that the method used for calculating the number of his prior convictions for impeachment purposes under § 906.09, STATS., was unreliable. He contends that the rules for proving prior convictions for purposes of convicting a defendant as a repeater under § 973.12, STATS., should also apply when determining prior convictions under § 906.09. We disagree.

Section 906.09, STATS., is part of the rules of evidence, applicable to both criminal and civil cases. In contrast, § 973.12, STATS., is part of the criminal

code, where it is common to hold the prosecutor to a higher standard. Most importantly, the two statutes serve different purposes. Section 906.09 is concerned only with impeaching the credibility of a witness, while § 973.12 directly increases the punishment of a defendant. While a prior conviction is not an element of a charged offense, it is an essential element of proof to be satisfied at sentencing if the State is to secure the additional punishment it seeks. *See* ***State v. Koeppen***, 195 Wis.2d 117, 129-30, 536 N.W.2d 386, 391 (Ct. App. 1995). It is thus much more than an evidentiary fact, as is the situation when a prior conviction is used for impeachment purposes.

The record establishes that Williams' prior convictions were reliably proven for purposes of § 906.09, STATS. The prosecutor provided the trial court with a teletyped printout of William's criminal record indicating that Williams was convicted of a drug offense in 1984, criminal trespass to a dwelling and criminal damage to property in early 1990, and burglary and theft in 1991. The printout was furnished by the Crime Information Bureau of the Wisconsin Department of Justice, one of whose duties is to collect information on criminal convictions occurring in Wisconsin and make that information available to law enforcement authorities. *See* § 165.83(2)(f) & (n), STATS. In addition, Williams admitted being convicted of the 1984 drug offense, as well as the criminal trespass to a dwelling and criminal damage to property charges. He and his counsel also acknowledged the burglary conviction in 1991, and his probation agent indicated that she had a copy of the judgment of conviction for the 1991 burglary. No basis therefore exists for concluding that his prior record was not reliably established for impeachment purposes under § 906.09.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.